IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

1. Smt. Mukesh Dev & Another Vs. State of Rajasthan
(D.B. CRIMINAL APPEAL NO.942/2005)

D.B. Criminal Appeal under Sec.374(2) Cr.P.C. against the judgment dated 30-9-2005 in Sessions Case No.36/2003 passed by Sh. Gopesh Chandra Dixit, RHJS, Additional Sessions Judge Khetri District Jhunjhunu.

2. Mahavir Vs. State of Rajasthan & Others
(D.B. Cr. Revision Petition No.1237/2005)

D.B. Criminal Revision Petition under Sec.397 read with 401 Cr.P.C. against the judgment dated 30-9-2005 in Sessions Case No.37/2003 passed by Sh. Gopesh Chandra Dixit, RHJS, Additional Sessions Judge Khetri.

3. Surendra Singh Vs. Krishna Kumar & Others
(D.B. Cr. Revision Petition No.1038/2005)

D.B. Criminal Revision Petition under Sec.397 read with 401 Cr.P.C. against the judgment dated 30-9-2005 in Sessions Case No.36/2003 passed by Sh. Gopesh Chandra Dixit, RHJS, Additional Sessions Judge Khetri.

Date of Judgment: January 11, 2007.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA
HON'BLE MR. JUSTICE R.S.CHAUHAN

Mr. Suresh Sahni] for the appellants.
Mr. R.M.Sharma]

Mr. M.L.Goyal, Public Prosecutor for the State.
Mr. M.R.Mitruka, for the complainant.

BY THE COURT:(PER HON'BLE Shiv Kumar Sharma,J.)

Smt. Mukesh Devi and Ghanshyam @ Mahaveer, appellants herein, along with Krishna Kumar, Dayala Ram and Smt. Suman Devi were placed on trial before learned Additional Sessions Judge Khetri, who vide judgment dated September 30, 2005 convicted and sentenced the appellants

as under:-

Mukesh Devi:
U/s.302 IPC:

To suffer life imprisonment and fine of Rs.500/-, in default to further suffer one year simple imprisonment.

U/s.341 IPC:

To suffer simple imprisonment for one month.

U/s.323 IPC:
To suffer simple imprisonment for one year.

U/s.324/34 IPC:

To suffer simple imprisonment for one year.

Ghanshyam @ Mahaveer:
U/s.302/34 IPC:

To suffer life imprisonment and fine of Rs.500/-, in default to further suffer one year simple imprisonment.

U/s.341 IPC:

To suffer simple imprisonment for one month.

U/s.323/34 IPC:
To suffer simple imprisonment for one year.

U/s.324 IPC:

To suffer simple imprisonment for one year.
Sentences were ordered to run concurrently.

2. The brief facts as unraveled by the prosecution at the trial are as follows:-

On May 22, 2005 the informant Surendra Singh (Pw.5) submitted a

written report (Ex.P-3) at police station Buhana, stating therein that on the said day while his father and brother were going from the well after unloading bricks, Ghanshyam, Krishna Kumar, Smt.Mukesh and five others came in a jeep armed with lathi, Barchhi and axe and wayled his father Raghuveer and brothers Krishna and Banwari and started beating them. On raising hue and cry Suresh and Hari Ram intervened and took them to hospital. On that report a case under sections 147, 148, 149, 341, 3213 and 307 IPC was registered and investigation commenced. In the course of investigation injured Raghuveer died and Section 302 IPC was added. Post mortem on the dead body was performed, necessary memos were drawn, statement of witnesses were recorded, the accused were arrested and charge sheet was filed. In due course the case came up for trial before the learned Additional Sessions Judge Khetri. Charges under sections 148, 341, 323, 324, 302 alternatively 302/149 IPC were framed. The accused denied the charges and claimed trial. In support of its case the prosecution examined as many as 11 witnesses. In the explanation under section 313 Cr.P.C., the accused claimed innocence. No witness in defence was however examined. Learned trial Judge on hearing final submissions convicted and sentenced the appellants as indicated herein above. Co-accused Krishna Kumar, Dayala Ram and Smt. Suman Devi were however acquitted. Complainant Surendra Singh assailed the finding of acquittal in revision petition No.1038/2005. Whereas appellant Mahaveer has challenged the acquittal of the members of complainant party in the cross case instituted by the accused party in revision petition No.1237/2005. We proceed to decide all the three matters together.

3. Learned counsel for the parties during their respective

submissions took us to the material on record, a look of which demonstrates that prior to the death the injuries sustained by Raghuveer (deceased) were examined vide injury report (Ex.P-7), which reads thus:-

1. Swelling with bruise 2½" x 2" on left temporal region.
2. Abrasion with bruise with swelling 2½" x 2" on upper 3rd and lateral side of left leg
3. Weakness on Rt.& upper lower limb of Rt.half of body on hemiporesis

Autopsy on the dead body of Raghuveer was performed by Medical Board and postmortem report (Ex.P-6) was drawn. As per Dr. Vidyadhar (Pw.6), who was one of the member of Medical Board, the cause of death was coma due to head injury.

4. Injured Krishna Kumar (Pw.1) received following injuries vide injury report (Ex.P-8):-

1. Lacerated wound with clots 1" x ½" on chin
2. Abrasion 1" x 1" post of left wrist
3. Bruise swelling 4" x 3" upper 3rd & left part of Rt.forearm
4. Bruise with swelling 1½" x 1" on left foot.

5. Injured Banwari Lal (Pw.2) received following injuries vide injury report (Ex.P-9):-

1. Incised wound with clot fresh 2½" x ¼" x ¼" on post fronto mellac
2. lacerated wound 3" x ½" x ¼" anterior fronto halla
3. Lacerated wound 1" x ¼" x ¼" between Rt.thumb & Rt.index finger.
4. Bruise with swelling red 2" x 1½" post of left arm
5. Abrasion red ½" x ½" post of Rt.elbow.

On X-ray (Ex.P-10) no fracture was found.

6. In assailing the impugned judgment learned counsel for the appellants Smt.Mukesh Devi and Ghanshyam urged following points:-

(i) The entire record was prepared by the police contrary to the statutory Police Rules,1956 therefore the whole investigation is vitiated.

(ii) The appellants neither supplied any information nor any fact was discovered. When the appellants were in custody, the police forcibly obtained the signature of appellants and it could not be said that information was obtained under section 27 of the Evidence Act.

(iii) The prosecution has suppressed the genesis of occurrence for the reason that the appellants and other members of accused party sustained injuries in the same transaction and their injury reports Ex.D-4, Ex.D-5 and Ex.D-7 were drawn. Injuries of accused Dayala Ram and Mahaveer were found grievous. Since the injuries sustained by accused were not explained the prosecution story became doubtful.

(iv) The prosecution witnesses changed the place of incident at the trial.

(v) The appellant Smt.Mukesh was alleged to have inflicted one injury with hockey stick and it was not repeated, as such she could not be held guilty under section 302 IPC.

(vi) The deceased was admitted to hospital on May 22, 2000 and remained under treatment till May 27, 2000. He died after six days of the incident.

(vii) The medical board has not opined that the injuries found on

the person of deceased were sufficient to cause death in the ordinary course of nature therefore conviction under section 302 and 302/34 IPC was not proper.

(viii) Atar Singh IO (Pw.10) admitted in his cross examination that in FIR No.71/2000 registered under sections 451, 323, 336, 325 and 326 IPC against members of complainant party viz. Banwari Lal, Krishna Kumar, Raghuveer and Kanni Ram. He also admitted that the incident occurred at the residence of appellant Ghanshyam.

(ix) Suresh (Pw.3) and Hari Ram (Pw.4) were planted witnesses and they were not present at the time of incident.

(x) The injury received by the deceased and other members of complainant party appear to have been caused in exercise of right of private defence.

7. Per contra, learned Public Prosecutor and learned counsel for the complainant supported the impugned judgment and urged that the trial court having carefully assessed the statements of prosecution witnesses rendered the impugned finding and there was no illegality in it. They also argued to convict co-accused Krishna Kumar, Dayala Ram and Smt.Suman Devi.

8. In order to appreciate the rival submissions when we scrutinised the prosecution evidence we notice that Surendra Singh (Pw.5) in his deposition stated that on May 22, 2005 around 7 AM his father and Suresh went to Beni to load rodi in camel-cart where Banwari and Krishna also met and when they were loading rodi, Ghanshyam, Mukesh, Krishna Kumar, Suman and Dayala Ram came and Mukesh inflicted a blow with hockey

stick on the head of his father. Ghanshyam was having Barchhi, Krishna and Dayala were having lathis and Suman was having stone in her hand. After his father fell down, Krishna gave lathi blow on his leg. When Krishna and Banwari tried to rescue his father, they were also beaten up.

Krishan Kumar (Pw.1) also deposed that on May 22, 2000 in the morning while they were loading stones in camel cart of his uncle Raghuvir meanwhile Ghanshyam, Dayalaram, Krishna, Suman and Mukesh came and Mukesh inflicted hockey blow on the temple of Raghuvir due to which he fell down, thereafter Krishna gave lathi blow on his leg. When he and Banwari tried to save him they were also beaten up. Testimony of Krishna Kumar gets corroboration from the statements of Banwari (Pw.2).

9. From the material on record salient features of the case may be summarised thus:-

(i) Cross cases were registered between both the parties.
(ii) Appellant Ghanshyam and another member of accused party Dayala Ram received injuries
(iii) Deceased Raghuveer received only one injury on his head.
(iv) Injuries sustained by appellant Ghanshyam @ Mahaveer and another member of accused party namely Dayala Ram were grievous in nature and they were not explained by the prosecution witnesses
(v) In the FIR no specific role was assigned to Smt.Mukesh and Ghanshyam @ Mahaveer and general allegations were levelled against the accused party.

10. Coming to the contention of learned counsel for the appellants that complainant party was the aggressor and the appellants had right of private defence, we find that section 97 IPC recognises the right of a person to defend his own or another's body. Their Lordships of the Supreme Court in Mahabir Chaudhary Vs. State of Bihar (1996)5 SCC 107, indicated two measures of right of private defence, one is the first degree which shall not reach up to causing of death of the wrong doer, the other is the full measure which may go upto causing death. Both measures are however subjected to the restriction enumerated in Section 99. Section 104 IPC contains the bridle that right of private defence shall not cross the limit of first degree as against acts which would remain as theft, mischief or criminal trespass. But Section 103 recognises extension of the said right upto the full measure, even as against the aforesaid acts but only if such acts or their attempts are capable of inculcating reasonable apprehension in the mind that death or grievous hurt would be the consequence if the right is not exercised in such full measure. The emerging position is that unless one has reasonable cause to fear that otherwise death or grievous hurt might ensure, the right of private defence cannot be used to kill the wrong doer. It was held that when the acts are amounted to mischief the accused had a right of private defence to thwart the same. In the course of exercise of such right of private defence, the accused who gunned-down the mischief-makers, has obviously acted far in excess of right of private defence. Nonetheless the first degree of right of private defence cannot be denied to the accused.

11. In Subramani Vs. State of T.N. (2002)7 SCC 210 the Apex Court propounded that if the appellants acted in exercise of their right of private defence of property, it cannot be said that they committed a criminal

act in furtherance of a common intention, because section 96 makes it abundantly clear that nothing is an offence which is done in the exercise of the right of private defence. They did not commit any criminal act or to do anything which may be described as unlawful. Their object was not to kill the deceased but to protect their property. It may be, that in a given case it may be found on the basis of material on record that some of them may have exceeded their right of private defence and for that they may be individually held responsible. But it cannot be said that the murder was committed pursuant to a common intention to commit such crime. The intention of the appellants was not to cause death of the deceased, but they had acted in exercise of their right of private defence. While acting in exercise of the right of private defence, the appellants cannot be said to be motivated by a common intention to commit a criminal act. Common intention has relevance only to the offence and not to the right of private defence.

12. Their Lordships of Supreme Court in Subramani Vs. State of T.N. (supra) in regard to non explanation of injuries sustained by the accused indicated as under:-

> "The appellants suffered injuries on vital parts of the body, even though simple but the prosecution failed to give any explanation for such injuries. The prosecution feigned ignorance about the injuries suffered by the appellants. It is not possible to accept the submission that the injuries being simple, the prosecution was not obliged to give any explanation for the same. Having regard to the facts of the case the omission on the part of the prosecution to explain the injuries on the person of the accused may give rise to the inference that the prosecution is guilty of suppressing the genesis and the origin of the occurrence and had thus not presented the true version."

13. In Vajrapu Sambayya Naidu Vs. State of A.P. (2004)10 SCC 152 the Apex Court held that where the injuries sustained by the accused were not explained by the prosecution it probabilise the case of defence that the prosecution party was the aggressor.

14. It is well settled that where the charge against the accused is one of culpable homicide, the prosecution must prove beyond all manner of reasonable doubt that the accused caused the death with the requisite knowledge or intention described in Section 299 of the Penal Code. It is only after the prosecution so discharges its initial traditional burden establishing the complicity of the accused, that the question whether or not the accused had acted in the exercise of his right of private defence, arises.

15. In Mohd. Ramzani Vs. State of Delhi (AIR 1980 SC 1341), the Hon'ble Supreme Court indicated that the onus which rests on an accused person under Section 105, Evidence Act, to establish his plea of private defence is not as onerous as the unshifting burden which lies on the prosecution to establish every ingredient of the offence with which the accused is charged beyond reasonable doubt. A person faced with imminent peril of life and limb of himself or another is not expected to weigh in "golden scales" the precise force needed to repeal the danger. Even if he at the heat of the moment carries his defence a little further than what would be necessary when calculated with precision and exactitude by a calm and unruffled mind, the law makes due allowance for it.

16. In Mohinder Pal Jolly Vs. State of Punjab (AIR 1979 SC 577), the Hon'ble Supreme Court indicated as under:-

> "The onus is on the accused to establish the right of private defence of property or person not on the basis of the standard of proving it beyond doubt but on the theory of preponderance of probability. He might or might not take this plea explicitly or might or might not adduce any evidence in support of it but he can succeed in his plea if he is able to bring out materials in the records of the case on the basis of the evidence of the prosecution witnesses or on other pieces of evidence to show that the apparently criminal act which he committed was justified in exercise of his right of private defence of property or person or both. But the exercise of this right is subject to the limitations and exceptions provided in S.99 of the Penal Code."

17. In Chuhar Singh Vs. State of Punjab (AIR 1991 SC 1052), where in the quarrel was between the accused and deceased the accused received injuries during the course of occurrence causing death of deceased by gun shot, the accused could be said to have exceeded his right of private defence and convicted under Section 304 Part I IPC. Their Lordships of Supreme Court observed as under:-

(Para 6)

> "Now the question that arises for our consideration is whether the appellant would be entitled for a complete acquittal on the plea of right of private defence of his person. We have no hesitation in coming to the conclusion that the appellant had exceeded his right of private defence of his body when causing the death of the deceased by using the dangerous weapon, namely, the gun and hence he is not entitled for complete acquittal but would be liable to be convicted under Section 304 Part-I IPC."

18. In Devraj and Another Vs. State of H.P. (1994 Supp.(2) SCC 552), their Lordships of Supreme Court observed in para 9 as under:-

> "As already mentioned, we are concerned only with Dev Raj now. Dev Raj as well as Des Raj undoubtedly received injuries during the same occurrence and when they have taken the plea

> that they acted in self-defence, that cannot be lightly ignored particularly in the absence of any explanation of their injuries by the prosecution. It is not necessary to refer to various decisions where it has been held that the accused if acted on self-defence, need not prove beyond all reasonable doubt and if two views are possible, the accused should be given the benefit of doubt. Having regard to the nature of the injuries on the two accused persons, we find it difficult to hold that their pleas altogether are unfounded. Then the next question would be whether they had exceeded the right of self-defence. Admittedly, the occurrence is said to have taken place in a sudden manner. Even, according to the prosecution, they did not come there armed. A quarrel ensued there and they picked up iron pipes and wooden phattis that were lying there and a clash took place. In such a situation, their plea of right of private defence has to be accepted, but having regard to the injuries inflicted by them on the two deceased persons as well as on PW.23, they have definitely exceeded the right of private defence and the accused are entitled to the benefit of Exception 2 of Section 300 and the offence punishable is one under Section 304 Part II IPC."

19. Division Bench of this Court in Veera Vs. State of Rajasthan (1981(5) RCC 169) indicated that injuries on the person of the accused found immediately after the occurrence but not explained by the Prosecution, accused alleging that his gun went off during the attack by the deceased, plea of self defence proved by the accused and made out by evidence sufficient to acquit him.

20. In Puran Vs. State of Rajasthan (AIR 1976 SC 912) It was indicated that where sudden mutual fight ensued between the parties, there is no question of invoking the aid of Section 149 IPC for the purpose of imposing constructive criminal liability. The accused can be convicted only for the injuries caused by him by his individual acts.

21. In the case on hand as already noticed that mutual fight between the parties occurred all of a sudden. In such a situation it could not have been held that the appellants Smt.Mukesh Devi and Ghanshyam @ Mahaveer had shared common intention and charge under section 34 IPC is not found established. Having regard to the facts of the case, omission on the part of prosecution to explain the injuries on the person of accused gives rise to the inference that the prosecution is guilty of suppressing the genesis and the origin of the occurrence.

22. So far as charge against appellant Smt.Mukesh Devi is concerned, she as per the prosecution case inflicted only one injury on left side of temple of the deceased. She, in the facts and circumstances of the case did not appear to have intention to cause murder of the deceased. This possibility can not be ruled out that in order to save her husband, father and brother she inflicted solitary injury on the person of deceased and did not repeat the same. She therefore can be held guilty for her individual act and is liable to be convicted under section 325 IPC. The guilt of appellant Ghanshyam @ Mahaveer, in the facts and circumstances of the case, is punishable only under section 324 IPC.

23. We have heard the submissions of learned counsel in revision petitions Nos.1237/2005 and 1038/2005. Having scanned the material on record and reasons drawn by learned trial Judge in support of the judgments, we do not find any illegality in the reasons. The acquittal of Krishna Kumar, Dayala Ram and Smt. Suman Devi, in the facts and circumstances of the case, is justified. Similarly the acquittal of members of complainant party in the cross case does not call for any interference, since charge against members of complainant party could not be established beyond reasonable

doubt.

24. For these reasons, we dispose of instant matters in the following terms:-

(i) We partly allow the appeal of appellant Mukesh Devi and instead of Section 302 IPC, we convict her under section 325 IPC and sentence her to suffer rigorous imprisonment for one year and fine of Rs.100/-, in default to further suffer 15 days rigorous imprisonment. We however acquit her of the charges under sections 341, 323 and 324/34 IPC. Looking to the fact that appellant Mukesh Devi has already undergone confinement for more than 20 months and she is in jail, we direct that she shall be set at liberty forthwith, if not required to be detained in any other case.

(ii) We partly allow the appeal of appellant Ghanshyam @ Mahaveer and acquit him of the charges under sections 302/34, 341 and 323/34 IPC, we however confirm his conviction under section 324 IPC, for which he has been sentenced to suffer one year simple imprisonment. Since the appellant Ghanshyam @ Mahaveer has already undergone confinement for more than 20 months and he is in jail, we direct that he shall be set at liberty forthwith, if not required to be detained in any other case.

(iii)We find no merit in the revision petitions bearing Nos.1237/2005 and 1038/2005 and the same stand accordingly dismissed.

(iv) The impugned judgment of learned trial court stands modified as indicated above.

(R.S.Chauhan),J. (Shiv Kumar Sharma)J.

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